UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-2311 Hon. Marianne O. Battani
IN RE: Ceramic substrates cases	No. 16-03802 No. 16-03803
THIS RELATES TO: Dealership Actions End Payor Actions	

MOTIONS TO DISMISS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, April 19, 2017

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Detroit, Michigan
Wednesday, April 19, 2017
at about 10:19 a.m.

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(Court and Counsel present.)

THE LAW CLERK: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

THE COURT: Good morning.

THE ATTORNEYS: (Collectively) Good morning, Your Honor.

THE COURT: All right. Let's start with appearances.

MR. KESSLER: Good morning, Your Honor. Jeffrey Kessler, Winston & Strawn, and I'm appearing today for the Corning defendants.

MR. AMATO: Jeffery Amato, from Winston & Strawn, for the Corning defendants. Good morning, Your Honor.

MR. MEISNER: Good morning. I'm Stefan Meisner, from McDermott Will & Emery, on behalf of NGK Insulator defendants.

THE COURT: Mr. Reiss.

MR. REISS: Good morning, Your Honor. Will Reiss

for the end payor plaintiffs. And for purposes of our argument I'm also going to be speaking on behalf of the auto dealer plaintiffs.

MR. OCHOA: Omar Ochoa, Your Honor, from Susman Godfrey, also on behalf of the end payor plaintiffs and the auto dealer plaintiffs.

THE COURT: How do you say your last name?

MR. OCHOA: Ochoa.

THE COURT: Ochoa?

MR. OCHOA: Yes. Thank you.

MS. LI: Good morning, Your Honor. Evelyn Li, from Cuneo, Gilbert & LaDuca, on behalf of the auto dealer plaintiffs. I will only speak when necessary.

THE COURT: All right. This is motions to dismiss. Defendant Corning, you want to start?

MR. KESSLER: Thank you, Your Honor.

THE COURT: Mr. Kessler.

MR. KESSLER: Your Honor, if it pleases the Court, there are two issues in our motion; one is the statute of limitations and one is the separate Twombly point with respect to Corning. We've discussed it among counsel, and we thought it might be most efficient for the Court for NGK's lawyer to speak briefly to the statute of limitations, which they are also asserting, after I complete my argument, and then plaintiffs will finish the argument back and forth for

the statute of limitations, and then I would move on to address the Twombly argument.

THE COURT: So you want to separate your two arguments?

MR. KESSLER: Because the legal points obviously are very similar, and we thought that would be most efficient.

THE COURT: Okay.

MR. KESSLER: And finally, one other housekeeping item, Your Honor. If I may approach, we prepared a time line demonstrative that we thought would be useful for the consideration of this argument.

THE COURT: Thank you.

MR. KESSLER: And counsel for the plaintiffs have copies of this as well.

THE COURT: Okay.

MR. KESSLER: So addressing the statute of limitations --

THE COURT: Wait, hold on one second here. These are multiple copies of the same?

MR. KESSLER: Yes, I provided three in case -- for your clerk or for others.

THE COURT: Okay.

MR. KESSLER: Thank you, Your Honor, and good morning.

THE COURT: Okay.

MR. KESSLER: Approaching the statute of limitations, this motion we believe is different from any of the motions to dismiss that you have considered so far in this very large and sprawling MDL. The reason is that more than -- now it's five years ago Corning issued a public disclosure of the investigation of the specific product that was involved stating that this could have a material effect on Corning's operations and finances depending on how the investigation concluded.

This happened on March 30th, 2012, if you look at the time line, the first red dot. And significantly this was just seven days after this Court took the unusual step of appointing co-lead counsel for this MDL not just for the cases that were filed but for any future cases that were going to be filed. And we think it is very clear that given that set of circumstances that the plaintiffs here, both their counsel and frankly the companies because the same companies that filed actions back in '11 are many of the same plaintiffs today who have been in this MDL all the time for the indirects for a four-year period of time.

THE COURT: Well, let's say that they -- that they at least knew something was going on because of this filing.

MR. KESSLER: Yes.

THE COURT: Maybe even because they were involved

in some other parts and knew that there was some major antitrust violations, but I'm curious as to what do they do then, this inquiry notice thing, what happens with inquiry notice? Do they start -- I mean, do they start their own independent investigations or what?

MR. KESSLER: Yes, Your Honor. So to get the answer to this question we first go to the Dayco case in the Sixth Circuit, and what Dayco Corporation made clear is that once they have something sufficient to put them on inquiry notice they have to then plead what reasonable diligence steps did they take over that four-year period of time or else it is dismissed, that's what happened in Dayco.

And what's significant about it here is no diligent steps are pled here. Normally, Your Honor, we have an issue on a motion to dismiss where the plaintiffs say we undertook the following steps of diligence and you have a dispute, was that sufficient or not? These complaints don't do that. What these complaints do is they dispute that they were on inquiry notice as a result of all of this publicity, and they say therefore they don't -- they didn't have to take any due diligence steps until the Corning CIKK plea of the subsidiary that took place over four years later.

And the reason that's wrong, Your Honor has already addressed this as you've addressed many things already, in the trucking motion regarding bearings, what happened there,

you may recall, is there was a tremendous amount of publicity regarding the raids that took place on the bearings companies, and the bearings companies in the motion against the truck dealers argued well, this should have put the trucking plaintiffs on inquiry notice. And what the court said is the following, which I think is very significant. The court said: Although it is clear, clear, that the publicity put potential plaintiffs on notice of claims against some of these defendants involving passenger vehicles, the notice of claims on trucking weren't as clear.

Well, this is right on point for us because it is clear that the notice that was given by Corning which, by the way, received widespread publicity, there is no question about that, and then there's repeated each quarter in the securities filings over and over again over the four-year period of time, so that's much more notice than was at issue in wire harness, so you've already found that type of notice to be clear.

So what steps could they have taken to get back to you? Well, what normally happens is that plaintiffs then, for example, hire an economist and they have an economist study the industry and come up with facts to see if they could find evidence that prices were behaving in a certain way that would suggest conspiracy, that it's a concentrated industry, that there are barriers to entry, et cetera. They

also frequently reach out to companies to see because they knew who the companies were in this industry, there were only three companies that were involved, to find out who is the ACPERA applicant. And they try to say come tell me now if you want to be timely and try to get information that way.

Now, it's interesting because Mr. Williams, okay, who is the -- one of the lead counsel, as you know, here in the resistors case, and this is the reason we cited it, it illustrates the steps. In resistors there was a public disclosure of the grand jury investigation, Mr. Williams engaged an economist, he studied the industry, he reached out to see who the ACPERA applicants might be and see if he could get any information there. He did not, but he at least tried that. He put together though through his economist and other information using the publicity as well as a complaint, and in that case the Court found that that complaint was sufficient on that basis. In other words, it was no challenge that he could file a complaint there -- actually it was a subsequent complaint. Now, I should mention that is subject to another motion to dismiss. But the point here was that in resistors he was able to file a complaint.

In the batteries case we cited he filed his first complaint before there was any plea or indictment, but here we have one more fact, and this is very significant, in 2015 NGK did its plea agreement. Well, that was within the four

years from when the Corning notice took place. So if he was pursuing his diligence, even if he claimed prior to NGK he couldn't gather enough information somehow which, by the way, none of which is pled in the complaint, there's no steps of diligence pled, he could have certainly once he had the NGK plea and once he got cooperation there, which he stated in his complaint that he had, he could have stated a claim then which would still be within the four-year period of time.

What he can't do is just sit back -- and look, I'm not criticizing him, this case has 38 different parts, he may have -- they may have decided this wasn't such an important case, you know, frankly, that we think the conduct here is not very significant, but put that all aside for whatever reason they decided to wait. And if the statute is not enforced here, Your Honor, then who knows what next case is going to get added to this MDL based on their claims because what they claim is their second argument is well, even if we were on inquiry notice -- they tried to argue they weren't on inquiry notice, that's the first part, but then they say even if we were we should be able to continue to bring cases as long as there are effects of the conduct that extend into the limitations period under a continuing violations theory.

Now, first, Your Honor has to consider the implications of that. The effects they are focusing on is when consumers bought cars that would have these parts in it.

Your Honor, that could be ten years from now. There could be a used car that is resold with one of these ceramic substrates for which you would first have a consumer who they might claim has an effect, there is no limit at all. If that were the law this MDL will never end because you're constantly --

THE COURT: It may never end anyway.

MR. KESSLER: Well, it may never end anyway, but the point is we would all like it to end, right? And to have a rule that the statute never ends because the effects focus on the ultimate consumer is not the law. Now, how do I know this? Three cases Your Honor should read: Peck, Z Technology Corp, those are the two main ones, and I'm going to talk about Lamictal, which is not in this circuit. Peck and Z Technology Corp are both Sixth Circuit cases.

What those cases make clear is the focus of a continuing violation is there must be new wrongful conduct, what they call an overt act, by the defendants, not the conduct of the plaintiffs in purchasing their automobile. It is the wrong focus, and it is very easy to understand why that is because the statute of limitations is based on witnesses' memories, it's based on documents being lost, it's based on repose, all of those principles would go from the defendants' conduct, not from the issue of some effect happening down the road there.

And in Pace this was directly at issue, so Pace was a Section 1 case, there were some other claims, but it was a Section 1 case, and the argument was that the agreement -- the unlawful agreement was made outside the limitations period but they kept implementing the agreement inside the limitations period. Exactly what you have here.

What you have here are claims that there were agreements entered into through July of 2011 but that there were agreements entered with the car companies and sales to the car companies continue to take effect later on because of the model years in terms that were covered. Exactly Peck. And what the court said is the following, this is at the very end of the decision: Because the timing of the defendant's overt acts, not the timing of the plaintiff's injuries, controls the statute of limitations issue, the plaintiff's antitrust claims are time-barred.

And that is reiterated again in Z Technology Corporation, which is a Section 2 case, but it cites back to Peck. And what it says there is just because you are still having monopoly prices charged later for acts of monopolization long before, that doesn't mean that the statute of limitations is continuing. To restart the statute of limitations it has to be a new overt act by defendants.

Now, one of the things that plaintiffs say is they've actually said in their brief that we somehow

misstated their complaint as to what they are alleging about the continuing acts. So I want to be very clear about this, and I reread the complaint three more times to make sure we are right. I can represent to the Court that the only specific allegations of the agreements regarding any Corning entity, okay, is through July of 2011, and you can search the complaints over and over again, this is not a case where we are fighting over that they allege some other meetings or agreements later and we are arguing well, is that enough. Okay. There's zero allegations about that.

What they do say is that their class continues as long as the effects continue, that's what they say. And my point here is that does not get them past Peck. It does not get them past Z Technologies.

Now, they may cite, Your Honor, they have in their brief your Lear holding, so I want to address that. Your Lear holding is not at all inconsistent with the position we are taking, and I will explain why. In Lear Your Honor was not presented with the statute of limitations argument, you were presented with an argument of whether or not Lear had discharged all of its liability in bankruptcy, and the issue was has it been alleged in the complaint that Lear engaged in conduct after the discharge that would be sufficient to keep them liable in the case. Your Honor held that there was.

But in Lear there was a plea agreement by one of

Lear's co-conspirators that implicated Lear past the discharge period, and so Your Honor said in this complaint there is sufficient evidence -- or not evidence, there are allegations of Lear engaging in competitor meetings, unlawful conduct after the discharge so therefore it's not discharged. That has nothing to do with this case.

If they had specific allegations of competitor meetings by any Corning entity into the limitations period then we would be in Lear, but because they do not have that, all they have is the general conclusory assertions in their brief that they are seeking relief for the class through today, there is nothing else specific on Corning at all, that is why it has to fail regarding that.

THE COURT: Okay.

MR. KESSLER: Now, besides that, Your Honor, just two more points I want to make about this. One is they make an argument that well, what about a plaintiff who didn't purchase a product at first until after the limitations period, how would they even know that they had a claim or something like that. Well, the most important point about that, Your Honor, is that issue is not presented by this complaint. In order to -- remember, we are not deciding this motion for the class, we are deciding it for the named plaintiffs, that is all we can do on a motion to dismiss here. And if you dismiss this, by the way, it has no impact

on any future class action that someone might bring or not bring, okay, it just gets rid of this case because these plaintiffs haven't brought their claims within the statutory period.

The point here is that none of these plaintiffs allege at all when they purchased their product except it's sometime from the beginning of the class period in the 1990s through the time of the complaint, we don't know when they purchased their product, but I can tell you because these are the same plaintiffs that we are deposing in all of the cases, okay, they all made purchases prior to the expiration of the limitation period. The consumers all bought at least one of their cars prior to the limitations period so the dealers were in business prior to the limitations period, so we don't even have the hypothetical case as to whether -- if someone came in who first bought a car today whether they would have a claim.

By the way, I would argue they don't but my point is that it is not even before Your Honor to consider that. The point -- because they make no allegations about that. They would have to allege in their complaint here, is a plaintiff who didn't buy until after it expired so this plaintiff somehow because it was too speculative to assert injury should be able to still have a claim under the Zenith Hazeltine case. I don't think they could actually

state such a claim but that claim is not here, so you don't have to worry about that claim. The claims that are here are barred by the statute of limitations.

Finally on the unjust enrichment, just two points on that. So unjust enrichment is an equitable doctrine and therefore it is not strictly applied by a statute of limitations, but the same analysis applies for two reasons. One is that the Madison case we cited to you in the Sixth Circuit talks about the fact that when you have an equitable claim that is based under the same underlying facts as the statutory claims, and it is just basically another remedy for that, that you apply the same statute of limitations because otherwise it would defeat the purpose of the legislature in having the statute of limitations says if you didn't apply it when it's basically the same claim. As Your Honor knows, there is no separate facts for this unjust enrichment claim, it is exactly the same facts and therefore applies.

And one case that we didn't cite which I would like to add for you that specifically does this for unjust enrichment that we found subsequent to our brief, the case is -- and this is Western District of Michigan, the case is Harden, H-A-R-D-E-N, vs. AutoVest, LLC, and the citation for this is 87 UCC Rep Serve 2nd 272, it is not in the Federal Supp yet but it is in this Reporter which is perhaps why we

didn't find it until right now in terms of that.

THE COURT: UCC Reporter?

MR. KESSLER: Yes. It is 87 UCC Reporting Service, it must be, R-E-P Service 2nd 272, and this specifically was applying Michigan law, which is one of the statutes at issue, and said the following: The Michigan Supreme Court has long recognized that statute of limitations may apply by analogy to equitable claims. If legal limitations periods do not apply to analogous equitable suits a plaintiff could dodge the bar set up by a limitation statute simply by resorting to an alternative form of relief provided by equity. This is basically the law in all the states. So, in other words, you get to the same place.

We believe that the statute of limitations applies to require the dismissal of not all but the vast majority of their claims in this case. It will leave them, by the way, with, I think, three states have antitrust laws that have a six-year statute of limitations and the legislature can certainly decide that, and I think two states have consumer protection claims they've asserted that have a longer statute of limitations, those would be there, but by having this decided now you will have so narrowed the scope of this case that it obviously will facilitate its resolution or by contrast if this issue were not decided now the disputes over this statute issue would probably prolong this case for a

very, very long time in terms of our ability to resolve it.

THE COURT: Okay. Thank you.

MR. KESSLER: So unless you have questions, Your Honor, I'm going to sit down now and turn it over to my colleague for a brief addition.

THE COURT: All right. Mr. Meisner?

MR. KESSLER: I'm sorry, Your Honor. There is also a Westlaw cite for the case which I've been told is better to give you, which is 215 Westlaw 4583276. Thank you.

MR. MEISNER: Thank you, Your Honor. Stefan Meisner, from McDermott, Will & Emery, on behalf of NGK Insulators, and I will be brief.

We fully agree with what Mr. Kessler has just said with respect to the statute of limitations, but I wanted to highlight just one or two small points that are important for NGK Insulators.

The first of this is, is that the statute of limitations, it's the injury, that when plaintiffs should have discovered the injury, not necessarily the names of all of the defendants that begins the period. And as Mr. Kessler just pointed out, that certainly happened as of the time that Corning disclosed in its SEC documents in 2012 -- March 30th, 2012 that it was under investigation.

As Mr. Kessler pointed out, there is no allegation -- there are no allegations of an investigation

that the plaintiffs put forth to try to discover their claim, and we agree with that point as well. If they had they would have discovered that two months prior to that filing by Corning, Corning also announced in its annual report that in this industry, the specific ceramic substrates industry, its primary global competitors were Denso and NGK Insulators, so it at least had information available to it if it had performed a reasonable investigation to have the identity of NGK insulators at that time. However, that's not required by the law. What is required by the law is that once it is on notice of its injury, and, again, as Mr. Kessler just explained, that happened as of March 30th, 2012, the limitations period begins.

I want to point out that at that time and any time from that point if the plaintiffs had performed an investigation it could have filed a complaint perhaps against Corning and unnamed defendants. Have we seen this before in this MDL? Yes, we certainly have. In fact, it's in our complaint too. The complaints in our cases name Corning, the Corning defendants, Denso, the NGK Insulators defendants and unnamed other co-conspirators, so clearly the plaintiffs can, if there is at some point if this case continues, include other potential defendants.

Now, has this happened before? Yes, it has. In the occupant safety restraint system case the plaintiffs

filed a complaint against the defendants that it named and unnamed co-conspirators. Two years after that this Court allowed the plaintiffs to amend to include another named defendant that they had discovered in that period, and that was unopposed by the defendants at that time.

Likewise, in electronic power steering, the end payor's case, the plaintiffs similarly filed a claim against named defendants and, quote, unnamed co-conspirators and subsequent to that time they moved to amend and add named defendants -- new defendants to that case which, again, this Court granted, and it was not opposed by the defendants at that time. So this is not an unusual position for NGK Insulators to take.

All I'm -- I'm going to sit down now unless the Court has some questions, but I just want to highlight that it is the discovery of the injury that puts the plaintiffs on notice, plaintiffs seem to suggest that they need to know the names of NGK Insulators in order to be able to make a claim against NGK Insulators. They certainly knew of NGK Insulators' participation in the ceramic substrates industry at that time. And this Court has allowed and the plaintiffs have practiced as shown that they could file a claim against Corning and unnamed co-conspirators and then amend that claim to bring in NGK Insulators if they subsequently discovered that.

And that's all we have to say in addition to what Mr. Kessler has said with respect to the statute of limitations.

THE COURT: Okay. Thank you.

MR. MEISNER: Thank you, Your Honor.

THE COURT: Mr. Reiss.

MR. REISS: Thank you, Your Honor. Before I get into the fraudulent concealment arguments and the argument that Mr. Kessler has made that we were put on notice as of the date of Corning's public disclosure in 2012, I don't even think you need to address that issue because there are a number of different arguments as to why the statute of limitations has not been tolled.

And one of the arguments was not addressed by Mr. Kessler, and that's the fact that we allege a continuing conspiracy with respect to the defendants' conduct. So Mr. Kessler makes the argument that the conspiracy had to stop in July 2011, that effectively the Corning defendants withdrew from the conspiracy on that date, and he bases that argument on the Corning defendants' guilty plea. So in the guilty plea they admit that they participated in the conspiracy, that they engaged in conduct with respect to the conspiracy until at the latest July of 2011, but we don't plead that the conspiracy ended on that date and, in fact, our complaints contain illustrative examples throughout the

class period, and this Court has repeatedly held that with respect to guilty pleas these are negotiated instruments, they are --

THE COURT: Yes, but once the guilty plea is entered you are saying that they continue this activity or some antitrust activity, right? So you are looking at what the defendants are doing?

MR. REISS: Well, no, Your Honor, the guilty plea was actually entered in 2016.

THE COURT: I'm sorry.

MR. REISS: But in their guilty plea they admitted to participating in the conspiracy through at least August of 2011, so we didn't know about the guilty plea until five years later. So forgetting about the issue of when we were put on notice, their argument that the statute of limitations has expired is premised on the notion that they withdrew from the conspiracy in 2011.

And what I'm saying is that to the extent that they make that argument that's a question of withdrawal, that's a fact question, the burden is on them to demonstrate that. And again the Court has repeatedly held that the guilty plea is in no way limiting in terms of what we are permitted to allege, and the Court has held that on numerous occasions.

THE COURT: But you are agreeing with what Mr. Kessler said in terms of, I think, this continuing

violation because you're saying -- you're saying that in 2016 they said that they had been -- they admitted behavior from 2011 to 2016?

MR. REISS: No, they had admitted behavior from the --

THE COURT: I mean through 2011, excuse me.

MR. REISS: They had admitted participating in the conspiracy from I believe the late '90s until at least 2011, so the question then is because of this admission and, again, it wasn't an admission that the conspiracy stopped on that date, it was just an admission by the Corning defendants -- I should say by Corning International that they continued to participate until at least 2011, and so that's contrary to our allegations in which we say the conspiracy continued beyond that date.

Now, it would be one thing if they pleaded guilty in 2011 and then they could make an argument potentially that they withdrew from the conspiracy, but they didn't plead guilty until five years later, so it is certainly plausible based on our allegations that the conspiracy continued beyond that date and the Court has held similarly.

THE COURT: But that's what I'm trying to get straight. So you are saying -- well, maybe you are saying this, that it is plausible, only that it is plausible, that the conspiracy continued beyond 2011 --

MR. REISS: Correct.

THE COURT: -- even though when they pled they said it ended in 2011?

MR. REISS: They didn't even say it ended, they just admitted that they participated in the conspiracy until at least July 2011. And, in fact, in their plea allocution they suggest that they conspired with NGK and that was the only defendant that they conspired with, but if you look at NGK's plea agreement NGK's plea agreement is -- they admit to continuing in the conspiracy until 2010, a shorter period. So the clear inference there is that these are negotiated instruments, NGK for better or worse negotiated a better deal, but that is not proof that the conspiracy abruptly stopped in August 2011, and if that's -- or July of 2011, and if that's what the Corning defendants are arguing that's an affirmative defense and the case law is clear that the burden is on them through discovery to demonstrate that they withdrew from the conspiracy on that date.

THE COURT: Do you have any burden to show that the conspiracy continued beyond the 2011 date?

MR. REISS: Well, I think we have a burden to demonstrate that it is plausible and there's certainly no reason to believe that it is not plausible when you have a guilty plea admitting conduct until that date, and when we have illustrative examples throughout the period. And,

again, we are not the Department of Justice, we don't have subpoena power, so the only thing we have in our possession is the guilty plea, and then we have some illustrative examples, but there's certainly no reason to believe, as I said, that the conspiracy abruptly stopped. And, again, the burden is on them to show that they withdrew from the conspiracy, not on us to show that they were continuing to participate so long as we can allege that it was plausible that the conspiracy was continuing, and there is no suggestion that they withdrew from the conspiracy in 2011, that's for certain.

But I would say, Your Honor, that even if you don't agree with that and, again, I think that's a fact question, we do plead that the effects of the conspiracy continued beyond that date. And I know Mr. Kessler cited some case law and I think a lot of the case law that he cites is distinguishable, but we allege in our complaint that there was basically a three-year period between when the RFQ process started and then when ultimately the substrates, which is the product at issue, went into production, and then beyond that the OEMs awarded the business typically to the customer for four to six years, so you're talking about a lag time of about eight or nine years potentially between the last conspiratorial conduct.

So let's take Mr. Kessler at his word and let's

assume that the conspiratorial conduct stopped in 2011. Based on our allegations the price-fixed sales were continuing for years after that and, you know, Mr. Kessler argues that your decision in the Lear case with respect to wire harness is not on point but the Court explicitly held in that case and it cited to a Supreme Court opinion in the Klehr case that each subsequent price-fixed sale, each inflated sale resulting from the conspiracy, is a new overt act, and it starts the statute of limitations running anew.

And the cases that Mr. Kessler cites to are not price-fixing cases. One of the cases that he cites to is Z Tech, is a merger case, and that court explicitly distinguishes the Klehr case, it actually cites Klehr in a positive light but it says it doesn't apply to mergers because unlike a conspiracy a merger is a single discreet act so it is not a continuing violation.

So Mr. Kessler's attempt to distinguish from these cases is just not on point. The Sixth Circuit has never held that in the context of a price-fixing conspiracy subsequent sales of inflated prices do not start the running of the statute of limitations anew.

So, again, because of this gap, even if their conduct stopped in 2011 it very well may be based on our allegations that they are still selling cars at price-fixed -- or I should say components at price-fixed

prices today, and Mr. Kessler --

THE COURT: When would it end? I mean, the example that Mr. Kessler gave of the used car, if somebody needs a --

MR. REISS: Well, first of all, a used car is not at issue in this case. Our classes for both dealers and end payors we purchased new vehicles. And we do have a specific time frame; our complaint says that typically the OEMs award the business for anywhere from four to six years and there is a three-year lag time, so we are talking at most a nine-year gap, that's what we are talking about. This is all going to be fleshed out, Your Honor, in discovery, it is not appropriate for resolution on a motion to dismiss, but discovery will flesh this out, but it is certainly not going to go on in perpetuity, our allegations don't suggest that, so I think this parade of horribles that Mr. Kessler is suggesting is entirely overblown.

THE COURT: But you are saying that -- say they enter into the contract to produce these things and that is when they gave the inflated prices, that because that continues basically for the life of that contract, which is many years, that is a continuing violation because it is, what, it is renewed every year --

MR. REISS: It is renewed by each --

THE COURT: By every sale?

MR. REISS: -- by each subsequent sale.

I mean, that's what the Klehr decision held and, Your Honor, that's what you held in the wire harness case with respect to Lear. I mean, what happened in Lear is you had a bankruptcy and essentially a new Lear entity emerged from the bankruptcy, and Lear made the argument we didn't have any allegations or significant allegations regarding its conduct, and we emphasize that even if we didn't have significant allegations regarding its conduct we did have allegations that it continued to sell wire harnesses at price-fixed inflated prices. And your Court cited to the Supreme Court holding in Klehr, which is directly on point for the proposition that subsequent sales and inflated prices do, in fact, start the statute of limitations. It is an overt act by which the defendant is benefiting from the conspiracy. It is different than just passively sitting back and doing nothing.

THE COURT: Okay. Let's go back to the inquiry notice though if you need that. What do you allege you did, if anything, with this inquiry notice?

MR. REISS: So I have two points there. The first point, Your Honor, is that I disagree with Mr. Kessler that this -- what I would say is an opaque disclosure in NGK financial statements regarding potential antitrust violations for a host of automotive products -- by the way, we haven't filed in a number of these products -- that that was

sufficient to put us on notice of our claims.

Now, I think Mr. Kessler actually recognizes this and so he makes this big point that the disclosure received widespread public dissemination, and that's simply not the case. So Mr. Kessler cites to I think four articles that were published within a three-day period of the initial disclosure and then he cites to a blog. This is in stark contrast to wire harness, for instance, when the Department of Justice announced the government investigation and you had widespread publicity, you had the Wall Street Journal, the New York Times, enormous dissemination throughout the country, that's just simply not what happened here.

And even if, in fact, Your Honor, we were put on notice of the facts of the disclosure, and I would argue that we were not, that was not sufficient, Your Honor, for us to have notice to bring a claim. I think those are two very different questions. Again, the disclosure didn't say the entities that were involved in the price-fixing conspiracy. In fact, it is notable that the disclosure came from Corning, Inc., that's the U.S. parent, and Mr. Kessler is going to get up in a few minutes and he's going to argue to you that Corning, Inc. didn't participate in the conspiracy. Corning International is nowhere referenced and so --

THE COURT: Well, they promise to cooperate though in the plea.

MR. REISS: They did promise to cooperate, but we would not have known from that that Corning International participated, and Mr. Kessler presumably would have had us file several years ago naming Corning, Inc. and then he would have filed a motion to dismiss and he would have said, gotcha, Corning, Inc. didn't participate in the conspiracy. And moreover there is case law he would have cited to, and I'm not saying that this case law is definitive, but he would have cited to cases saying the mere disclosure of an investigation is not sufficient to state a claim against the defendant.

And beyond that, Your Honor, this argument that we didn't perform due diligence, first of all, the case law is pretty clear that due diligence is an objective standard, it is not a subjective standard, so to the extent that some of our plaintiffs have filed other automotive parts cases or some of the lawyers filed cases in different actions, that's not binding on us, and Mr. Kessler I think represents four or five other defendants in the auto parts cases and he's a great lawyer, so he argued to you, and I think persuasively then, that these are separate conspiracies with separate defendants and what happens in one conspiracy is not necessarily binding on another conspiracy, right? And so as mentioned before in wire harness, that case received widespread publicity but that doesn't put us on notice as to

Corning's participation in an entirely separate conspiracy.

And I want to address Mr. Kessler's point that we didn't engage in due diligence. The case law is clear that that's an objective standard, so the standard is would a reasonable plaintiff in our position be put on notice and exercise due diligence, and if they do would they learn about the violation sooner than what we allege? And we allege that's not the case, but more importantly we actually do, contrary to what Mr. Kessler argues, we do have allegations about due diligence. In fact, we state that in 2014 we had communications with a confidential witness that provided us with information about NGK's participation in the conspiracy and Denso's participation in the conspiracy, and so the clear inference from those allegations is that we were performing an investigation, but that at that time we still did not have information sufficient to name the Corning defendants in the conspiracy.

And another point that Mr. Kessler makes, and I think this decision is actually on point for us, you know, your decision with respect to the truck dealers in the wire harness case, so the truck dealers admitted that they potentially were put on notice of the wire harness investigation as it pertained to vehicles but they said they didn't necessarily have notice as it pertained to trucks and equipment -- and I'm sorry, I think that's the occupant

safety systems case, not wire harness, but in any event the truck dealer said well, we may have had some notice about some potential investigation but it wasn't sufficient until a subsequent disclosure by the JFTC, and that's exactly what we are arguing here, that even if you think that we are on notice of this potential disclosure about potential violations, that didn't give us sufficient notice about the conspiracy, didn't give us sufficient notice to name the Corning defendants until a subsequent disclosure by the Department of Justice. And so for purposes of the motion to dismiss you should construe every inference in our favor, and subsequently if after discovery if there's evidence that comes out that we didn't do our homework and we didn't investigate well maybe that's a different question then but for purposes of a motion to dismiss it should not be resolved now.

And the final point that I want to make is, you know, Mr. Kessler cites to these other complaints that were filed by Mr. Williams or by plaintiffs in other auto parts cases in which we, Mr. Kessler would say, we allege that we were put on notice as of the date of the government investigation, we filed on that date. And, first of all, those are different cases and so they are not binding in any way on us, and as I mentioned, there may have been different disclosures there that did put plaintiffs on notice, very

different than here.

But Mr. Kessler, with all due respect, he omits a very important portion of those allegations. What we say in those allegations is that we were put on notice at the earliest of the date of disclosure about a DOJ investigation or a government investigation and so those allegations were not a concession that the investigation and disclosure of the investigation put us on notice, they were intended as a floor anticipating a potential motion to dismiss, they were intended as a floor to say even if this were, in fact, the case the statute of limitations doesn't bar our claims, but whether they constitute a concession or not they are certainly not binding here.

So unless you have any other questions, Your Honor, thank you.

THE COURT: Thank you.

MR. OCHOA: Just briefly, Your Honor, to address the NGK point. There is no support for NGK's assertion that Corning's filing provided plaintiffs inquiry notice as to claims against NGK. There was no case law that was cited in NGK's opening brief or its reply and, in fact, there is case law to the opposite, plenty of cases that have been brought up by defendants in previous motions to dismiss that you can't simply name a competitor in the industry through guilt by association, so the fact that there was no announcement,

there was no disclosure about any of NGK's specific activities does mean that the plaintiffs were not on inquiry notice as to NGK.

And the two specific examples that they cited, the OSS complaint and the EPSA complaint, which were just different. The ability for plaintiffs to add new defendants after filing the initial complaint had nothing to do with whether the plaintiffs had named -- or had referred to unnamed co-conspirators and it had everything to do with we just didn't have the ability to name those defendants until the point when we did so --

THE COURT: Okay.

MR. OCHOA: Thank you.

MR. REISS: Your Honor, I'm sorry, with the Court's indulgence, there was one additional point I would like to make if that's okay?

THE COURT: All right.

MR. REISS: You had me moving up to the fraudulent concealment allegations but I wanted to address one other argument under the statute of limitations. You know, we, again, as I discussed before, explained that there is this lag time in our allegations, right? You have the RFQ process and, again, if Corning defendants assert that their last conspiratorial conduct was in 2011 you have a lag time between when the actual parts go into production and then

when the vehicles are produced and when they are sold to our class members. So that means, again, that a number of our class members are not purchasing vehicles until potentially 2014, 2015, maybe later, maybe earlier, but the case law is clear and Mr. Kessler referenced this Zenith case and there is Sixth Circuit authority that is also supportive of this that a plaintiff cannot be put on notice -- cannot be found to have a statute of limitations run against it prior to having a cause of action.

So here where our plaintiffs and our class members didn't even purchase their vehicles in many instances, how is it that they could be found to not have a claim to be barred by the statute of limitations? It is just common sense, Your Honor, that a statute of limitations cannot begin to run and a cause of action cannot begin to accrue until a plaintiff purchases the price-fixed product.

THE COURT: What about named plaintiffs as Mr. Kessler addressed?

MR. REISS: Well, Your Honor, I think defendants have moved to dismiss on this ground in earlier cases and Your Honor found that we weren't required to actually specify the dates in which our plaintiffs purchased vehicles. And, Your Honor, I mean, it is common sense that our plaintiffs are continuing to purchase vehicles, right, throughout the class period and, in fact, if Your Honor requires it we would

be happy if we need to, I don't think we need to because we have a lot of other arguments here, but if we needed to we could amend certainly to express the dates in which our plaintiffs purchased vehicles and the deposition testimony that has taken place, a number of our class reps, nearly all of them have already been deposed reflects that they didn't purchase their vehicles until long after 2011, so, you know, maybe Mr. Kessler wants to prolong this and force additional amendments but, Your Honor, it is a no-brainer that our plaintiffs and our class reps purchased vehicles beyond 2011 and well throughout that time.

THE COURT: Okay.

MR. REISS: Thank you.

THE COURT: Mr. Kessler.

MR. KESSLER: Your Honor, the problem with virtually every one of plaintiff's arguments is that they are arguments that have no corresponding factual allegation in the complaint. This is a motion to dismiss, it is not about counsel's arguments. For example, starting with the first one, you asked him flatly are you contending there were conspiratorial acts continuing into the limitations period, and he said to you yes, we are. Not in his complaint. I will represent -- he cited you no paragraph. He can get up now if he likes and cite to you any paragraph in the complaint, there are none, Your Honor. All that the

complaint does for specific acts is identify the facts in the plea agreements of both NGK and Corning. It doesn't have any other factual allegations.

And I want to be clear, we are not arguing he could not allege facts beyond the plea agreements if he had a basis to allege such facts. That is a complete diversionary argument. We are not arguing he is limited by the pleas. What we're arguing is the only thing that he's put in a complaint allegation is what is in the pleas and the allocutions, and the pleas and the allocutions state clearly and specifically that there is nothing beyond July of 2011.

Now, if he said on -- he had some facts to show there was continuing meetings, he -- Your Honor said well, don't you have some burden? Yes, he has the Twombly burden, not just to say it is plausible. I know that word is used in Twombly but plausible has been well established by the case law; it doesn't mean that anything is possible, Your Honor. It is possible that anything happened, that's not plausible. What plausible means under Twombly, and Your Honor has said this, I think you said conclusory assertions are not enough, you said that many times, there has to be some facts pled beyond 2011, something. That was Lear. Okay.

Lear -- now Your Honor should go back, obviously you are very familiar with Lear, Lear was there were facts pled about conspiratorial conduct after the discharge. Here

there is zero. What is pled is effects. The only thing that's pled is that there were effects, so we are going to be down to the effects argument. I want to be very clear and I stand by this, there is nothing in this complaint -- as an officer of the court I represent to you there is nothing in this complaint of a conspiratorial act after 2011 identified, if there was he would tell you the paragraph in either of these complaints, and that's number one.

THE COURT: How would they know these things if this was a concealed -- you know, if there was concealment of this, that's what's alleged, how would they know the conspirator --

MR. KESSLER: Your Honor, he didn't have to know these things. What he had to do is after he was put on inquiry notice he had to allege and do the facts of due diligence in order to assert a claim within four years after being named co-lead counsel for all future automotive parts and bringing case after case and obviously monitoring as part of his responsibilities. This is not a plaintiff and a counsel unrelated to this matter. That's what he had to do and he would have asserted his complaint. Remember, when you say how would he know, that's a fraudulent concealment argument, and there is a doctrine of fraudulent concealment, but that only applies in this circuit if after inquiry notice you took steps of reasonable diligence to try to establish

your claim in that four-year period.

That's what didn't happen here. Dayco is directly on point. Dayco says if you do not allege due diligence steps, assuming you agree with me to put them on inquiry notice, which is all it had to do, and I stand by the fact that if you go back and look at your decision in the truck distributors you would find that you've already recognized that for passenger automobiles this was enough for just inquiry, and the inquiry would have been get an economist, try to contact the -- find out who the ACPERA applicant is, do other things that plaintiffs do in other cases, but most importantly when they got the NGK plea they certainly had enough to file then which was within the four years, and they chose not to file for whatever reason, that's where they are stuck.

So the first point has to be rejected because there is no complaint allegations to show continuing facts. The second one is the effects argument. Your Honor, I stand by the discussion in Peck. I just urge you to read Peck and then read Z Technologies, which shows that Peck is still good law in the Sixth Circuit because it's cited very favorably with respect to that. Peck was a Section 1 case, an agreement case, and what the argument was was the prior agreement in effect continued to be applied, and here is what the court said about that, it is very important. The court

said the following: Thus even when a plaintiff alleges a continuing violation, an overt act by the defendant is required by the defendant, not by the plaintiff doing something, to restart the statute of limitations and the statute runs from the last overt act. The Pecks contend that the action is not time barred, this was their argument, sounds just like plaintiffs here, because they felt the adverse impact of GMC and GMAC's conspiracy as recently as 1988. Now, this sentence is key. However, the fact that Pecks' injuries have a rippling effect into the future only establishes that they might have been entitled to future damages if they had brought suit within the four years of the commission of the last antitrust violation.

And it goes on to be clear that when the conduct alleged is an agreement, which is exactly what you had there was an agreement, the fact that you then pay under the agreement, they actually use that phrase in both Peck and Z Technologies, is not enough.

And here remember what the agreement was, the agreement that was pled was through '11, let's say it was Toyota, just make up a company, that there was a collusive discussion to a contract with Toyota outside of the limitations period and they are saying because the RFQs apply later on, later on we sold cars pursuant to that RFQ and pursuant to the award, but the overt acts other than

reaffirming -- applying the agreement all took place before it. That's their problem, they have to plead something else. Again, I believe Peck makes this clear, Z Technologies make this clear. Your Honor, I will rest on those two cases --

THE COURT: Okay. Thank you.

MR. KESSLER: -- with respect to that.

Finally, the last point that they made at the end, so they argued that again, well, maybe we have plaintiffs who bought cars later, and Your Honor quite rightly said well, where is it? And they said well, Your Honor said I don't have to plead when they bought it, and Your Honor did say that, but that doesn't mean if they want to rely upon that they should avoid pleading it. In other words, when they come in and said well, Your Honor, you should let this go because maybe I have a plaintiff who didn't buy a car until after -- it would have to be, by the way, after 2016, it would have to be after the limitation.

Remember, the period went until 2016, you know, into March, they would not have to after 2011, they could say maybe I have a plaintiff who didn't first buy until now, 2017. Well, first of all, that is not true because every single one of their plaintiffs bought before that, we know that from discovery in this case, so it is just not true, they couldn't say it under Rule 11. Okay. And so it is completely hypothetical and invoking Your Honor saying you

don't have to plead the date of purchase, that's okay, but if they decide not to plead the date of purchase, which they obviously know, they know what the date of purchase is, then they can't come into the court and say don't dismiss my case because hypothetically there might be a plaintiff in the future who claims they couldn't have any injury until after 2016, and maybe they have another case. By the way, Your Honor, if they ever file such a case I believe you will reject it but that's not an issue for today.

THE COURT: Okay.

MR. KESSLER: Thank you.

THE COURT: Thank you. Mr. Meisner, do you have anything else?

MR. MEISNER: Yes, just very briefly, Your Honor. Your Honor, I just would like to respond very briefly to the points made by Mr. Ochoa.

First of all, with respect to the idea that it's the injury that puts -- that begins the tolling period, we did cite Rotella vs. Wood, which is a United States Supreme Court case, that's 528 US 549. Ruiz-Bueno is another to look at, that's 2016 Westlaw 4473238. Again, we have cited this in our papers. And the Lamictal case which Mr. Kessler mentioned is cited very prominently in our papers, that's 172 F. Supp 3d 724.

I would also like to draw the Court's attention

with respect to one other point made earlier, and this is with respect to whether an AK report puts plaintiff on inquiry notice. And I take this out of actually Corning's brief, Corning's reply, this is at page 8 of Corning's reply: IPPs have pled before this Court in this MDL that tolling ceases upon, this is quoting the plaintiffs' complaint, the date that the defendant publicly disclosed an AK report that it received a subpoena from the DOJ's antitrust division related to a global investigation because, again quote, that is the date when plaintiffs discovered or reasonably could have first discovered their inquiry. That's in the exhaust systems case. Thank you, Your Honor.

THE COURT: Okay. Thank you.

All right. Let's move on to the second issue.

MR. KESSLER: Your Honor, this argument I think could be done very briefly.

THE COURT: Okay.

MR. KESSLER: Which is as follows: Okay. Out of the more than 269 paragraphs in one of the complaints and the 239 paragraphs in the other complaint, there are a total of four paragraphs that reference Corning Corporation. And, again, remember what Your Honor can only evaluate is what they've put in the complaint, so if counsel comes up and starts arguing other things, if it is not in the complaint it is not there, you can only evaluate what they've chosen to

put in.

So we look at those four paragraphs and what do those four paragraphs say? They say that Corning is incorporated in the State of New York, that it makes ceramic substrates, which is one of the products at issue in this case, that it owns -- wholly owns or controls CIKK as its subsidiary, that's the allegation, and that CIKK performs services for Corning in terms of marketing and selling its products. That's it. That is the entire sum and substance.

There is not one allegation that Corning Corp. was aware of any of the alleged conspiracies, that its employees ever attended an alleged conspiracy, that it directed its subsidiary to engage in conspiracy, nothing, it is just barren of any of the allegations. In the other cases where you've looked at this type of Twombly argument, in every one of the other cases there was a claim that the other entity participated in some way, was involved in some way, knew about it in some way. Again, this complaint has none of it, you can't look beyond the four paragraphs. Every other paragraph doesn't even mention Corning Corp.

Now, we further know that even if you dismiss with leave to plead that they couldn't add in Corning Corp. allegations consistent with Rule 11, so there is no reason to let them replead, and why is that? Because what they rely upon is the CIKK plea agreement and allocution which we have

submitted, and what that makes clear is that the CIKK facts involve a single employee, this is what they rely upon, so it all comes before Your Honor because you can look at the full plea agreement and allocution that they cited, a single employee who formerly worked at NGK who was engaged in certain discussions that it should not have engaged in, but there is no indication at all that Corning Corp. had anything to do with this, in fact, so much so that the government gave them a non-prosecution agreement after investigating the whole matter as a result of this plea.

Now, again, I'm not arguing what the government did binds them, that's not the point. The point here is they have no allegations to make about Corning Corp. and it is not sufficient for them to say, well, maybe if I engage in a discovery fishing expedition some day I will find out something about Corning Corp. that they could allege. I will represent to you that they won't, but even that argument doesn't get them anywhere.

What they have to do now for this defendant is have something. We are not making this argument for CIKK. CIKK entered a guilty plea. The facts about its one plea is set forth there. They allege it in the complaint. That's fine, and that's the conduct through July of 2011. CIKK has the statute of limitations issue but it is not making a Twombly argument here.

So that is really my entire argument, Your Honor. It is just they can't go beyond the four paragraphs and the four paragraphs are not enough.

THE COURT: Let's see what they have to say. Mr. Reiss.

MR. REISS: So, Your Honor, I'm not sure if that argument is familiar to you because numerous defendants have made the same exact argument in this case, in fact, numerous defendants where the affiliate company pleaded guilty and the other entity did not made the same exact argument. And I think, Your Honor, the Court's opinion in the occupant safety system case with respect to TRW is directly on point.

So there TRW, the U.S. entity, made the same exact argument, they said, well, look, Your Honor, our foreign subsidiary pleaded guilty, we didn't plead guilty, there is nothing in the guilty plea that references us, and so there is just nothing here, there's very few allegations. And the Court, as I urge you to do in our complaint, you looked at that complaint and you found a number of allegations that were suggestive of their participation.

You found first that we allege that TRW sold and manufactured occupant safety systems in the U.S., you found that was relevant. You found that allegations that there were a number of defendants who pleaded guilty were relevant including in that case TRW's wholly-owned subsidiary, the

foreign entity. You found that we alleged that the market was ripe for collusion, and that was relevant and probative of our plausibility. You also found that it was relevant that the parent company was located in the United States and that was the place where the conspiracy occurred, that that was probative, and for all of those reasons you denied a very similar motion to dismiss.

Now Mr. Kessler, being the good lawyer that he is, he recognizes that opinion, and he really takes pain to try to distinguish that case. So how does he try to distinguish it, what does he do? He cites to the guilty plea, the Corning International guilty plea. And he says unlike TRW and the Corning International guilty plea, the Department of Justice explicitly agreed not to prosecute Corning so somehow that's probative and that just renders our allegations implausible. But quite the opposite, Your Honor, if you take a close look at that guilty plea the provision that deals with the non-prosecution agreement is expressly conditioned on Corning, Inc.'s agreement to cooperate with the government throughout the investigation involving substrates.

And in Your Honor's opinion in HID ballast with respect to MELCO is directly on point, and there MELCO had pleaded guilty to fixing a number of different parts but HID ballast was not one of those parts, but in the guilty plea they pledge to provide the DOJ with cooperation, even though

HID ballast was not a part that they pleaded guilty to, and in return they, the government, assured them they wouldn't prosecute the case. And so Your Honor said, and this is a quote, the Court finds a strong inference of involvement arises from MELCO's agreement to cooperate in the HID ballast investigation.

That's exactly what we are saying here, Your Honor, that there should be a strong inference from the fact that they are prominently referenced throughout the guilty plea, they agreed to provide cooperation. And then you have Mr. Kessler making, you know, a big deal out of the fact that there was this public disclosure from Corning, Inc., the U.S. entity, that put us on notice where Corning, Inc. admitted it was being investigated and that it was subject to potential antitrust violation.

So all of these facts suggest that it is plausible that they participated in the conspiracy, and as Mr. Kessler concedes, we are not limited by the fact that the DOJ ultimately decided not to indict it and it didn't plead guilty, it quite possibly could have been a trade off, but it doesn't limit us in any way.

And so the second argument that Mr. Kessler makes is he looks at the plea allocution by the Corning International executive, and the Corning International executive makes a statement that Mr. Kessler says is

suggestive that the conspiracy was just limited to Corning International and not Corning, Inc. Well, Your Honor, that's a self-serving statement, it wasn't subject to cross examination by anybody, let alone the plaintiffs. And there is clear law in the Sixth Circuit that for purpose of taking judicial notice and just general evidence principles an out-of-court statement used for the truth of the matter being asserted is improper. It is hearsay in its strongest form. So that certainly doesn't support Mr. Kessler's argument.

So for all of these reasons we allege that the allegations are sufficient here with respect to Corning, Inc., they are no different than numerous other defendants where you have upheld our complaint. Thank you.

THE COURT: Okay. Thank you.

MR. KESSLER: Very quickly, Your Honor. So let's look at TRW because this makes my point. This is what the Court pointed out in TRW: The complaint further alleges that TRW Automotive directly participated in meetings and submitted rigged bids in furtherance of the conspiracy. Your Honor, there are no such allegations about Corning in this case, that's why I said this is very different. It says this is not a case where they have made allegations, and what TRW was arguing is that the allegation was not detailed enough, and you said it is detailed enough. Okay. Your Honor, there are no details, there's no allegations, very, very different.

MELCO, MELCO was a case where it was a U.S. subsidiary of a Japanese parent where the allegation was the Japanese parent engaged in all the conspiratorial meetings and then directed the subsidiary which it owned and controlled as to how to sell in the United States, and Your Honor citing Carrier Corp. said that was sufficient for now to keep in the subsidiary of the parent who controlled it.

This is the reverse. Okay. Again, a unique case. Here the parent is not alleged to have done anything. The parent is not alleged to have known about what this rogue employee of the subsidiary was doing. The subsidiary was in Japan where this took place. And it is nothing like MELCO. There is no allegation here that CIKK sent its products and directed and controlled its parent to sell the allegedly price-fixed products on its behalf, that's not these facts at all.

So, again, the problem with plaintiffs' case is their complaint. Their complaint does not have allegations that match up with any of these other cases, and it is no accident, Your Honor, because, as I would submit, if they came in with a new complaint and said, oh, CIKK controlled Corning who sold for it, I would move under Rule 11. If they came in with a new complaint that said oh, Corning Corp. engaged directly in conspiratorial meetings, I would move under Rule 11 to strike those allegations. The reason these

allegations are not here and they were in the other cases is because they know they have no Rule 11 basis to make them.

Your Honor, this is one of the few cases I think you will find in this docket where Twombly requires that there must be a dismissal of this defendant. Thank you.

THE COURT: Thank you. All right. Mr. Meisner?

MR. MEISNER: Thank you, Your Honor.

NGK Insulators has two additional arguments to dismiss the claim that it has put before the Court. One is with respect to application of the FTAIA to certain sales that plaintiffs allege in their complaint, and the other is with respect to antitrust standing. And with the Court's indulgence I would like to spend just a few moments on this, it has already been quite a morning so far.

THE COURT: Okay.

MR. MEISNER: I think with respect to the FTAIA it is important for me to say right at the outset that there has been recent case law that the Court has not addressed in this context that I think provides a lot of illumination onto why a particular group of sales that the plaintiff specifically allege should be removed from this case, and I would like to describe those sales.

Plaintiffs have alleged three categories or we call them groups of sales, A, B and C. A sales are sales that occur within the United States of ceramic substrates. We

don't -- the FTAIA argument that we make here does not apply to those sales. Group B sales are sales of ceramic substrates that are imported into the United States from elsewhere, Japan and elsewhere, but they come to the United States as ceramic substrates, and we, again, don't argue that those sales should be out of this case under the FTAIA.

Instead it is what are called Group C sales which the plaintiffs specifically allege are ceramic substrates that are processed into catalytic converters and exhaust systems that are installed into automobiles in Japan and elsewhere outside of the United States, and then those automobiles come to the United States not because NGK Insulators or Corning or Denso export those cars into the United States but because the car manufacturers do. In other words, the defendants have no role in those automobiles coming into the United States.

With respect to those Group C sales that plaintiffs have specifically alleged are subject to their damages claims, there have been two important recent decisions, one, Motorola Mobility by the Seventh Circuit, and the other by Judge Cox in this Court in the In Re Refrigerant Compressors case, that decision was last October of 2016, and -- excuse me -- Motorola Mobility was in 2015.

I would like to describe those cases for the Court. In those cases the court looked at situations where sales of

an allegedly price-fixed component in Refrigerant Compressors, refrigerant compressor is part of a refrigerator or some other finished product. In the case of Motorola Mobility it was display panels that wound up being incorporated into cellular phones. Those products were sold outside of the United States to other entities in a supply chain, incorporated into their relative finished products outside of the United States and brought into the United States.

The Seventh Circuit reasoned that under the FTAIA those were not import commerce to begin with. So is -- did those sales outside of the United States then have an effect -- a reasonably foreseeable direct effect on commerce within the United States, and did the conduct that is asserted give rise to the antitrust claim? Two important components that must be satisfied in order for those particular sales of those components incorporated outside of the United States into finished products in order for plaintiffs to have the ability to sue with respect to those sales.

First, the Seventh Circuit addressed this issue and said it does not give rise to a damages claim. The Seventh Circuit, with Judge Posner writing for the Seventh Circuit, relied on principles of international commodity as well as the notion that the sales took place

entirely outside of the United States of the price-fixed -- allegedly price-fixed component, and that it was not the defendants who brought that final product into the United States but rather in those situations it was the plaintiff who did so who -- or the plaintiff's subsidiaries who did so.

Now, in this situation we have an actual much more difficult situation for the plaintiffs because as the plaintiffs have alleged and incorporated in the plea agreements by reference, and they don't dispute that the Court can take judicial notice of those plea agreements, a ceramic substrate passes through multiple layers from the manufacturers to companies that are called coaters who apply a catalyzing substance and transform that ceramic substrate into something that can actually remove noxious toxins from exhaust that comes out of a car. Those catalyzed components then get incorporated into a catalytic converter, which is something you might be able to see underneath your car, and that catalytic converter then goes to another entity that creates an exhaust system before it is then provided to the OEM and assembled into a car.

So the chain of distribution for ceramic substrates from when it is manufactured to when it is actually put into a finished vehicle or product that these plaintiffs -- that it is then exported into the United States and the plaintiffs

get to, is a substantially longer chain than either that was described with respect to the cell phones at issue in Motorola Mobility and the refrigerators that were at issue in In Re Refrigerant Compressors. Both those courts said that while there may be some instance in which a tiny ripple effect occurs in the United States that doesn't matter because the claims -- the sales of those products all took place outside of the United States and therefore under the FTAIA they do not arise -- their claims do not arise under the laws of the United States.

The plaintiffs make two assertions with respect to this argument. The first is that the FTAIA does not apply to their state law claims, and I want to address that by saying that this Court in two prior parts cases has looked at the issue of whether the substantive antitrust law is applicable to plaintiffs' claims, and it was in the context of standing. And the Court concluded in those situations that the various states either had a statute -- a harmonizing statute with respect to federal law, including case law that interprets it, or the highest court in the other states that didn't have that sort of harmonizing statute also looked to federal law to describe the contours of the state antitrust claims.

In the bearings case, the bearings -- a bearings defendant brought a different argument -- type of argument under the FTAIA and presented lengthy briefing to the Court

on this issue of whether the FTAIA applied. And, Your Honor, the Court looked at that, acknowledged all the arguments and all of the authority that was presented to the Court and then went on to analyze the particular issue in that case with respect to the FTAIA.

And, again, I want to also highlight that this is a very recently developing situation, and I just want to point the Court to another decision in a different case, and it is the Capacitors antitrust case, I can give you a cite for this, that is 2016 U.S. District Lexis 136224, that's Northern District of California, in which that court has recently addressed this exact same issue and concluded that the scope of state antitrust claims with respect to foreign extra jurisdictional effect can be no broader than what is interpreted under federal law and the scope of the FTAIA. So the FTAIA certainly applies to the plaintiffs' claims.

THE COURT: Is -- let's see, is bearings the only other part in this case that we looked at the FTAIA?

MR. MEISSNER: To the best of our ability to look through every single motion to dismiss --

THE COURT: I tried to do that too.

MR. MEISSNER: -- that was the one we could find so, Your Honor, to the best of our understanding that's the case.

The other thing that the plaintiffs say in response

to this argument is that what we are really arguing is that they are indirect purchasers and that Illinois Brick does not apply in this situation. And they looked to the Refrigerant Compressors case and also the Motorola Mobility case and say that those cases are really just analyzing whether the indirect purchaser rule applies. While there is some analogy to the way the analysis unfolds under both the FTAIA and also under the Illinois Brick indirect purchaser rule, both courts have made it quite clear that the FTAIA is a completely separate ground for which the Court can look to the proper scope of plaintiffs' claims and rule whether a claim can be dismissed even if they have standing under the Illinois Brick doctrine, which we don't dispute that these plaintiffs have Illinois Brick, obviously we know that from many years of litigation in this case and before, we are not addressing Illinois Brick, the Illinois Brick aspects of both of those cases, rather we are squarely within the FTAIA. And, again, both of those decisions, Refrigerant Compressors as well as Motorola Mobility, make it quite clear that these are alternative grounds for which plaintiffs' claims must survive.

I want to very, very briefly talk about antitrust standing here. This is a very unique issue with respect to ceramic substrates, and I want to describe just very -- hopefully briefly and clearly what happens in the production

process from a ceramic substrate being released from our factories to when it winds up in an automobile, and these facts, again, plaintiffs do not dispute that are properly before the Court.

The ceramic substrate is basically a cylinder and that thing in and of itself cannot perform the function of converting gas that flows through it from something that is noxious to something that is much better for the environment. It has to be catalyzed through a chemical process, and that chemical process alters fundamentally this thing that comes out of our factories into something that can have gas go through it and its chemical properties transform that gas from the noxious gas into something that is acceptable under our environmental standards, for instance, in the United States.

Once that happens, once that catalyzing process happens, it is not possible to go back and alter or change back to the substrate that comes out of our factories; it is changed, it is altered. Once that substrate is catalyzed, it is a catalyzed product, it gets incorporated into a can, a tin can, and essentially that's what your catalytic converter is, and that catalytic converter is installed on an exhaust system, which again are big tailpipes with these catalytic converters on it, and then that exhaust system gets installed on a car and we buy the car.

The transformation of ceramic substrates into something that becomes a catalytic converter that can take exhaust and change it from something noxious to something that is not so noxious that is good or better for the environment transforms the product in a fundamental way. And under this Court's reasoning in previous cases in which the Court has analyzed antitrust standing it has said that in looking at the AGC factors, the Associated General Contractors factors, and in particular the first one, which is the link between the plaintiffs and the harm, you look to whether the product is traceable in its form, whether it has not been altered or transformed in the supply chain, and here it clearly has.

And so taking a look at weighing the AGC factor in terms of that first factor, if you -- again, the Court has relied on the Flat Panel and other cases that look at this particular issue, none of the parts that we have seen that have come before ceramic substrates is so fundamentally transformed. You can pluck them out of a car in some way, shape or form and it is the same thing that came out of the factory. That is simply not the case with ceramic substrates and why we very respectfully ask the Court to look at this issue anew with respect to ceramic substrates.

Once we got past that issue, the transformation issue, that changes the balance on the first factor of

Associated General Contractors in favor of the plaintiffs or in favor of the defendants. We submit the factor now weighs more importantly toward us because that connection between the plaintiffs and what comes out of our factory has been changed by the process that absolutely alters it into something completely different that is useful for the, as I say, the OEMs and also for the plaintiffs. Plaintiffs have no interest in buying a ceramic substrate or anything like it. Plaintiffs are interested in the catalyzed product that actually performs the function of removing pollutants from the air. That makes it different.

If you look at the rest of the AGC factors, factor 2 we concede weighs in favor of the plaintiffs, but factors 3, 4 and 5 goes to tracing things like duplicative recovery, the amount of impact that goes to the supply chain, those type of things because of this fundamental change that removes the product, ceramic substrate, and changes it into something else. We contend, as we said in our papers, that those factors should weigh in our benefit. The fundamental value of the thing is forever changed, you can't go back to it once it is transformed into the way that it is.

And, Your Honor, that's what we have to say with respect to that. Thank you.

THE COURT: Okay. Thank you.

MR. OCHOA: Hello. Omar Ochoa again on behalf of

the end payors and auto dealers.

With respect, first, to the FTAIA argument -- well, let me just back up and put some context on this. So both issues have been addressed by the Court, whether the FTAIA applies and bars plaintiffs from bringing claims and whether the plaintiffs have antitrust standing under AGC. And the Court in each time that it has analyzed these issues have found in favor of the plaintiffs. And so essentially what NGK is doing today is trying to differentiate itself under both instances but neither differentiates it from this Court's previous decisions.

As far as the FTAIA goes, Your Honor, there was some confusion I think in the initial briefing. There are two express exceptions to the FTAIA. Your Honor, there is the exception which has been at issue today in the argument and in the briefing, which is the domestic effects exception, and there is also the foreign import commerce exception. I think it has been cleared up now that allegations about ceramic substrates that have been sold in the U.S. are not at issue for the motion to dismiss, so we do appreciate that clarification.

But even as far as the domestic effects exception goes, which is what is at issue today, there are two elements that need to be met. The first is that the defendant's conduct has a direct and substantial and reasonably

foreseeable effect on domestic commerce, and the second is that the conduct gives rise to a Sherman Act claim. And so I think enunciating these two elements are important to really distill down to what the decisions in Motorola and Refrigerant Compressors came out to be.

In that case the first issue -- the first element, whether the defendant's conduct had a direct substantial reasonably foreseeable effect, was not at issue. It is not at issue here either. The defendants have not asserted any arguments as to why the plaintiffs' allegations in the complaint are not such that the defendant's conduct had a direct and substantial effect.

So the only real issue is whether or not the plaintiffs' claims give rise to a Sherman Act claim, and the obvious answer to that is yes. That -- since that is the only basis it is clearly wrong because this Court has found over and over again that the plaintiffs have properly alleged antitrust causes of action as indirect purchasers. NGK's argument is essentially seeking to undo the notion that these automotive parts case are proper.

And pointing specifically to the two cases cited by NGK, Motorola Mobility and Refrigerant Compressors, those cases are just not really on point for the Court's decision today. The -- NGK's counsel characterized us as describing those cases as analyzing whether the indirect purchaser rule

applies but that's not at all what those cases say. There really is just kind of a fundamental misunderstanding of the cases between plaintiffs and between NGK, and that disagreement is this: In those cases the court determined -- the Seventh Circuit in Motorola Mobility determined that the plaintiff who had brought the claim was bringing that claim on behalf of its subsidiaries, and because it was doing so it was bringing a derivative claim and that's the reason why an antitrust claim did not lie.

It wasn't that the conduct that was alleged can in no way ever be the basis for an antitrust claim, it is the specific plaintiff in that case did not have the antitrust claim at issue, and that's very clear from the Court's opinion on page 820 where it sums up after its analysis this is thus a case of derivative injury and derivative injury rarely gives rise to a claim under antitrust law. So it had nothing to do with the actions of the defendant, whether or not those can come under an antitrust law, it was that the specific plaintiff in that case cannot carry forward that claim, and as a result the Court found that those claims were barred.

Similar analysis in the Refrigerant Compressors claim, Your Honor, basically citing to the same analysis, it is the same set -- kind of facts, the same claims, and so the same results, so the interpretation of one case can be used

in the other. As a result, those claims are completely different from what we have here.

Plaintiffs are obviously bringing indirect purchaser claims, those indirect purchaser claims had been found proper over and over and over again, and so the notion that these two, quote/unquote, new cases somehow are dispositive and changed this Court's analysis previously found in FTAIA is just not correct, Your Honor.

As to the plaintiffs' antitrust standing, that also boils down to a simple issue, Your Honor, and that's whether the process of coating a substrate somehow alters it or makes it unidentifiable and untraceable. Noticeably NGK does not offer any analogous case to demonstrate that a simple coating over a product makes it untraceable or unidentifiable because it is just not true.

THE COURT: He says you can't pick out the product from the car now?

MR. OCHOA: Well, you can, it just has a coating on it. So the substrate keeps its form, keeps its same physical properties, but the coating on it does not change being able to identify the substrate in the car. It is just simply not true. This is not similar to other cases where courts have found the product to be untraceable.

One of those that we cited in our brief is the Los Gatos case out of the Northern District of California.

There the product at issue was titanium dioxide, which is a chemical ingredient that becomes part of a finished product that it is applied to, so chemicals are mixed together to create a whole other product. That's the type of a process that makes a product become unidentifiable and untraceable, not simply putting a coating over a product and then putting it into a catalytic converter.

So because there is no transformation of the process, because the substrate continues to be identifiable even with the coating surrounding it, again, that -- the fact of the coating does not change this Court's analysis and does not render that product unidentifiable, and for those reasons Your Honor's analyses stand also in this particular case.

THE COURT: Okay. Thank you. Mr. Meisner, I have a question to ask you.

MR. MEISNER: Please.

THE COURT: Do you think that Motorola leaves open the door for the pass-along damages, the Motorola case?

MR. MEISNER: So I think the issue there -- it is a very related issue. The issue is whether the substrates that are made and sold in the United States, whether there is pass on to the plaintiffs -- let's just take Group A sales for example. NGK and others sells ceramic substrates in the supply chain to a domestic OEM, hypothetically GM. In that situation the FTAIA would not apply because that is totally

domestic commerce, and all of the issues of pass-through, well, that's a completely separate analysis which is completely outside of the issue of the FTAIA. The way that it is similar in a way to the issue is that the sales that the FTAIA is concerned about are all of those sales that take place outside of the United States and, again, I'm just going to quote the Motorola Mobility case in this respect. What trips up -- this is 775 F3rd at 819. What trips up plaintiff's suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce gives rise to an antitrust cause of action. It is a bigger question.

And, again, in those -- in that situation the idea of the effect, the direct substantially reasonable foreseeable effect on U.S. commerce, that's a wholly separate inquiry, and counsel is right, for this motion we are not disputing that plaintiffs have alleged that, but what they have failed -- where they have failed is by alleging all of the specific facts about the sales of ceramic substrates abroad, and the way in which ceramic substrates move through the supply chain into -- once it's catalyzed and becomes a catalytic converter into an exhaust system into a car that comes into the United States.

Looking at the Motorola Mobility decision in particular, the Seventh Circuit focuses on the locus of all

of those sales outside of the United States and concludes that those claims with respect to those particular sales do not give rise to a U.S. antitrust claim. That's what we are focused on here.

So it is a slightly different issue than the pass-on issue, which, again, would be something that we would have to address if we have to address Group A and Group B sales.

THE COURT: Is that what the Seventh Circuit said, that they had waived that argument?

MR. MEISSNER: The Seventh Circuit assumed a way -- so we assumed that, yes, indeed there have been -- that the claimant in that particular situation would have satisfied that particular prong, the direct reasonably substantially foreseeable, although the Seventh Circuit cast some doubts about the ability to actually prove that, they assumed that they had satisfied that --

THE COURT: Okay.

MR. MEISSNER: -- particular element.

Okay. I want to get back to the standing argument in just a sense because I think that the idea that a product has to be -- the only products in terms of transformation that would be say sufficient transformation in order for there not to be standing would be chemical products that are mixed together that become a completely new sort of chemical

compound, and the Titanium Dioxide case was pointed to.

In this situation the cases say transformed or altered, and we are saying altered. The ceramic substrate is inert and it has to have this chemical process that changes it in order for it to become something that is useful, much like titanium dioxide would be combined with other chemicals. You can still probably identify the titanium dioxide in that product or get back to it in some way through another chemical process, but it is altered, it's mixed, it's blended, it becomes something different that performs a chemical reaction or some different type of chemical effect, much like a catalyzed substrate does exactly the same thing in a catalytic converter.

The idea that this is a coat of paint, I'm not sure exactly what plaintiffs are getting at here, but this coat of paint issue I like to take it akin to is if the product -- let's just take a coat of paint, a painter painting a work of art on a canvas, and in my analogy the canvas would be the ceramic substrate and the paints would be the complex blend of chemical products that are coated -- that the ceramic substrate goes through in order to become something that is useful for the end consumer.

And my analogy to an actual painting, you have the canvas but the many different paint colors that are applied to a painting to yield a work of art like that or something

very different, perhaps a masterpiece by Rembrandt or by Monet, the value -- the value of that -- the reason why transformation is important here in terms of tracing the injury is that the plaintiffs or the end consumer of this painting or the end consumer of a Rembrandt would pay whatever the value of that product is to them, and that is why transformation is important in terms of the traceability of the argument in these coats of paint analogy of the plaintiffs here.

It is not as simple as just washing it in water or an acid bath in which you pull it out and the ceramic substrate is clean, it is forever changed by the chemical coating processes. That's why this is different. Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

All right. The Court will issue an opinion. Thank you.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 12:03 p.m.)

CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Automotive Parts Antitrust Litigation, Case No. 12-02311, on Wednesday, April 19, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 05/03/2017

Detroit, Michigan